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No. 734

In the Supreme Court of the United States

OCTOBER TERM, 1936

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

AMERICAN SHEET & TIN PLATE COMPANY ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA

In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 734

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

AMERICAN SHEET & TIN PLATE COMPANY, APPELLEE

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

ALLEGHENY STEEL COMPANY, APPELLEE

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

PITTSBURGH PLATE GLASS COMPANY, APPELLEE

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

WEIRTON STEEL COMPANY, APPELLEE

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

WEST LEECHBURG STEEL COMPANY, APPELLEE

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

PITTSBURGH PLATE GLASS COMPANY, APPELLEE

125362—37——1

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA

STATEMENT AS TO JURISDICTION ON APPEAL

In compliance with Rule 12 of the Rules of the Supreme Court, appellants submit herewith their statement showing the basis of the jurisdiction of the Supreme Court of the above-entitled cases on appeal.

STATUTES

Section 5 of the Commerce Court Act (c. 309, 36 Stat. 539; U. S. Code, Suppl. III, Tit. 28, Sec. 45a).

Section 238 of the Judicial Code as amended by the Act of February 13, 1925 (c. 229, 43 Stat. 936, par. (4); U. S. Code, Tit. 28, Sec. 345).

Urgent Deficiencies Act of October 22, 1913 (c. 32, 38 Stat. 210, 219; U. S. Code, Tit. 28, Sec. 45 and 47a, Suppl. III).

DECREES

The decrees sought to be reviewed were entered July 29, 1936.

The petition for appeal was filed and the order allowing the appeal was entered September 25, 1936.

THE NATURE OF THE CASES AND RULINGS BELOW

These suits were brought by appellees to enjoin and annul six orders of the Interstate Commerce Commission entered in a proceeding, instituted by the Commission upon its own motion, entitled *Ex*

Parte No. 104, Practices of Carriers Affecting Operating Revenues or Expenses, Part II, Terminal Services. The orders require the railroads therein named to cease paying allowances or refunds to appellees for moving or "switching" railroad cars to and from points within their industrial plants or performing that service free or without charge in addition to their line-haul rates. The Commission first issued a general report (209 I. C. C. 11) based on the general investigation, and then issued supplemental reports dealing with the terminal practices at particular industrial plants, which supplemental reports are accompanied by orders directed against the carriers serving those particular plants. The orders attacked in the instant cases were issued in connection with the following supplemental reports:

American Sheet and Tin Plate Company Terminal Allowance, 209 I. C. C. 719, July 5, 1935.

Allegheny Steel Company Terminal Allowance, 209 I. C. C. 273, June 7, 1935.

Pittsburgh Plate Glass Company Terminal Allowance, 209 I. C. C. 467, June 25, 1935.

Weirton Steel Company Terminal Allowance, 209 I. C. C. 445, June 24, 1935.

West Leechburg Steel Company Terminal Allowance, 210 I. C. C. 213, July 29, 1935.

Pittsburgh Plate Glass Company Terminal Allowance, 210 I. C. C. 527, September 12, 1935.

Cars consigned to or by appellees are delivered to and received from them by the railroads upon interchange or "storage" tracks located upon and at the entrance to appellees' industrial plants. With their own locomotives, appellees (except Weirton Steel Company) then move or "switch" the cars from the interchange tracks to the particular points or "spots" within their plants when and as they require the contents of the loaded cars to be unloaded or the empty cars to be loaded at such "spots." (Such movement of cars to and from loading and unloading points within industrial plants is commonly called "car spotting.") On the theory that it is the duty of the railroads to perform this plant "spotting" service, appellees (except Weirton Steel Company) claim and receive from the railroads allowances or refunds out of the line-haul rates in amounts ranging from 65¢ to $1.28 for each loaded car so moved or switched by appellees. At the plant of the Weirton Steel Company, the railroad itself performs the "spotting" service free or without charge in addition to its line-haul rates, and the Weirton Company, of course, receives no allowance.

Upon consideration of the physical arrangement of the several plants and all the circumstances and conditions under which the spotting service is performed at each of the plants, the Commission stated its findings and conclusions of fact, of which the following with respect to the Weirton Steel Company are illustrative:

> We find that the switching service performed beyond the interchange tracks described of record is a plant service which respondent is not obligated to perform and for which it is not compensated under its line-haul rates; that the performance of said service by respondent without reasonable charge therefor, or the payment of an allowance for the service if performed by the industry results in the industry's receiving a preferential service not accorded to shippers generally; and that by the payment of said allowance the respondent carrier refunds or remits a portion of the rates or charges collected or received as compensation for the interstate transportation of property in violation of section 6 (7) of the act.

The order in each case directs the carrier or carriers serving the plant of the particular appellee to cease and desist on or before a specified date and thereafter to abstain from the practices found unlawful in the accompanying supplemental report.

Hearing in the district court was had before a statutory court of three judges. Findings of fact and conclusions of law were made and a written opinion rendered. The court held in substance: (1) that the plant "spotting" service is a transportation service which the carriers are legally bound under their tariffs and by "custom" to perform; (2) that, while certain circumstances such as physical impossibility or refusal of shippers to allow the railroads access to plants would relieve the carriers from the duty of performing the

spotting service, no such circumstances were disclosed by the evidence in these cases; (3) that the Commission had power only to regulate the amount of allowances for such service, and that it, therefore, exceeded its power in issuing the orders prohibiting any allowance; and (4) that the Commission did not make findings which were essential to the validity of its orders, namely, that the allowances in these cases were unreasonable, unjustly preferential, unduly discriminatory, or otherwise unlawful. The decrees annul, set aside, and permanently enjoin enforcement of the respective orders.

The questions presented are substantial. They involve not only the sufficiency of the evidence of record and the Commission's findings to support the six orders under attack, but also the very power of the Commission to prevent railroads from paying refunds or allowances to shippers for doing anything which they and the railroads choose to call "transportation" service, regardless of whether the thing done by the shippers is, in fact, a transportation service within the meaning of Section 15 (13) of the Interstate Commerce Act. The cases also involve the question whether the Commission has administrative power to determine the extent of the duty of railroads under their line-haul rates and what constitutes reasonable delivery of interstate shipments by railroad at the great industrial plants of large shippers.

United States v. *Idaho*, —— U. S. —— (No. 420), decided April 27, 1936;

United States v. *Northern Pacific Ry. Co.*, 288 U. S. 490;

United States v. *Baltimore & Ohio R. R. Co.*, 293 U. S. 454;

Merchants Warehouse Co. v. *United States*, 283 U. S. 501;

Los Angeles Switching Case, 234 U. S. 294.

Appended hereto is a copy of the opinion of the three-judge District Court filed May 23, 1936.

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Dated SEPTEMBER 25, 1936.

In the District Court of the United States for the Western District of Pennsylvania

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No. 3110 IN EQUITY

AMERICAN SHEET & TIN PLATE COMPANY

v.

UNITED STATES OF AMERICA

No. 3111 IN EQUITY

ALLEGHENY STEEL COMPANY

v.

UNITED STATES OF AMERICA

No. 3112 IN EQUITY

PITTSBURGH PLATE GLASS COMPANY

v.

UNITED STATES OF AMERICA

No. 3113 IN EQUITY

WEIRTON STEEL COMPANY

v.

UNITED STATES OF AMERICA

No. 3130 IN EQUITY

WEST LEECHBURG STEEL COMPANY

v.

UNITED STATES OF AMERICA

No. 3136 IN EQUITY

PITTSBURGH PLATE GLASS COMPANY

v.

UNITED STATES OF AMERICA ET AL.

Before Circuit Judge J. WARREN DAVIS; District Judges R. M. GIBSON and F. P. SCHOONMAKER

125362—37——2

Opinion

(Filed May 23, 1936)

SCHOONMAKER, *District Judge:* The six above entitled cases involving similar causes were brought under the Act of Congress of October 22, 1913 (38 Stat. at Large 219); 28 U. S. C. A., Secs. 41, (28), 45, 46, 47, to enjoin orders of the Interstate Commerce Commission requiring railroad companies to discontinue payments of allowances to plaintiffs for the performance of certain terminal service commonly called "spotting."

These cases were heard before J. Warren Davis, Circuit Judge; R. M. Gibson and F. P. Schoonmaker, District Judges.

By agreement of counsel in open court, the trials of these six cases were consolidated; they were heard and are to be determined on one record.

The orders of the Interstate Commerce Commission involved in these suits were entered in a proceeding entitled "Ex Parte No. 104, Practices of Carriers affecting operating Revenues or Expenses, Part II, Terminal Services."

The specific orders involved in these suits were issued respectively in connection with supplemental reports to that in "Ex Parte No. 104" dealing with the terminal practices obtaining at the particular industrial plants of the plaintiffs, as follows:

> *American Sheet and Tin Plate Company Terminal Allowance,* 209 I. C. C. 719, July 5, 1935.

Allegheny Steel Company Terminal Allowance, 209 I. C. C. 273, June 7, 1935.

Pittsburgh Plate Glass Company Terminal Allowance, 209 I. C. C. 467, June 25, 1935.

Weirton Steel Company Terminal Allowance, 209 I. C. C. 445, June 24, 1935.

West Leechburg Steel Company Terminal Allowance, 210 I. C. C. 213, July 29, 1935.

Pittsburgh Plate Glass Company Terminal Allowance, 210 I. C. C. 527, September 12, 1935.

The plaintiffs all operate manufacturing plants which are located in the vicinity of Pittsburgh, Pennsylvania, with the exception of the Pittsburgh Plate Glass Company, which, in addition to a plant in the Pittsburgh District at Ford City, Pennsylvania, also operates a plant at Crystal City, Mo. The plants of the other plaintiffs are located respectively as follows: American Sheet & Tin Plate Company, Vandegrift and Scottdale, Pennsylvania, and Wellsville, Ohio; The Allegheny Steel Company at Breckenridge, Pennsylvania; The Weirton Steel Company at Weirton, West Virginia; and The West Leechburg Steel Company at Leechburg, Pennsylvania.

All of these plants are served by the Pennsylvania Railroad Company, a common carrier engaged in interstate commerce, except the plant of the Pittsburgh Plate Glass Company located at Crystal City, Missouri, which is served by the Missouri Pacific Railroad Company and the St. Louis,

San Francisco Railway Company, common carriers engaged in interstate commerce.

At each of plaintiffs' plants, terminal switching is performed in connection with the receipt and delivery of freight under the provisions of duly filed and published railroad tariffs.

We quote from a typical tariff (Pennsylvania R. R. Tariff), effective June 1, 1917, applying to coal and coke traffic switched by American Sheet & Tin Plate Company at Vandegrift, as defining this switching service:

> On all carload revenue shipments, destined to or coming from the plant of the American Sheet and Tin Plate Company, the latter company performs the terminal switching service for account of the Pennsylvania Railroad Company.
>
> The American Sheet and Tin Plate Company will be allowed for such service, out of the current Vandegrift, Pa., rate, the actual cost of service performed, as specified in monthly bills computed and submitted in accordance with the terms of agreement dated April 7, 1917, between the American Sheet & Tin Plate Company, and the Pennsylvania Railroad Company, but not exceeding $1.10 per car.

The defendant railroad, pursuant to the several recited orders of the Interstate Commerce Commission, undertook to cancel and discontinue these switching allowances by tariffs, the wording of the tariff for the American Tin Plate Company at Vandegrift being typical of all:

> The Pennsylvania Railroad Company—Cancellation Notice—Local Freight Tariff —Terminal Allowances to American Sheet and Tin Plate Company at Vandegrift, Pa. * * * is hereby cancelled. Terminal allowances discontinued. Effective August 22, 1935. In compliance with Eighteenth Supplemental Report and Order of Interstate Commerce Commission in Ex Parte No. 104, Part 2, July 5, 1935.

The plaintiffs contend that these cancellation orders are unlawful because this "spotting" terminal switching service is a transportation service which the railroads are required by law to perform, and if the plaintiffs themselves perform it, they are entitled to compensation from the railroads. The Interstate Commerce Commission, on the other hand, contends that this service is not transportation service, because that service lawfully ends when the Railroads deliver the car for loading or unloading at the interchange or holding switch of the plant being served, and therefore the service complained of is a device to make an unlawful rebate to shippers.

The plaintiffs contend that the line-haul tariff rates cover not only delivery of cars to the interchange track of the industry, but also the delivery of cars beyond that point on a system of tracks leading to mills and warehouses, and "spotting" them at convenient points for loading and unloading; and that if the plaintiffs perform that service they are entitled to an allowance from the Railroad Company for that service.

The Interstate Commerce Commission contends that the line-haul tariff rate is for delivery of the freight car only at the interchange switch, and that the Railroad cannot be called upon either to "spot" freight cars at mill and warehouse platforms or to pay the shipper for doing what is exclusively its own work.

The question to be decided in the instant case is therefore whether the switching done by the plaintiffs within their own plants between the interchange or storage tracks and the platforms of their mills and warehouses is work that the Railroads are required to do as a part of transportation.

There appears to be no exact formula that can be applied in answering this question. The most that we can get from the decided cases is that the limits of place within which delivery is due will vary with varying conditions, and that such delivery is required, as is customary and reasonable: *Mitchell Coal & Coke Co.* v. *Pennsylvania R. R. Co.*, 230 U. S. 247; *New York Central & H. R. R. R. Co.* v. *General Electric Co.*, 114 N. E., 115, 117.

The Interstate Commerce Act (U. S. C. A. Title 49, C. 1, Sec. 1 (3) Definitions, defines "transportation" thus:

> * * * The term "transportation", as used in this chapter shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for

> the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, * * * and handling of property transported. * * *
>
> This section further provides in the succeeding paragraph that "It shall be the duty of every common carrier to provide and furnish such transportation upon reasonable request therefor."

However, it is certain that "spotting service" is "transportation" within this definition, and therefore a common-carrier service up to certain limits, and includes the placement of cars in position accessible to the consignors and consignees respectively for loading and unloading. By long continued custom and practice, such placements are made both on the carriers' tracks within their established terminals and on their own right of way, and also on private industrial tracks off the carriers' right of way and on the private property of the industries served. Such services are included in the established rates, unless in express terms the published tariffs otherwise provide: Car Spotting Charges, 34 I. C. C. 609.

We, therefore, reach the conclusion that "spotting services" are recognized in law as common-carrier service to which the shippers are entitled, and which the carriers are in duty bound to perform. In fact, the courts have held that writs of mandamus and mandatory injunctions will lie to enforce this right and compel this duty: *Missouri*

Pacific R. R. Co. v. *Larabee Flour Mills Co.*, 211 U. S. 612.

It is also certain that the carriers may either do this "spotting service" themselves or engage others, including shippers and owners of property transported to do it, and pay therefor a reasonable compensation out of their freight rates, without violating the law: *Mitchell Coal & Coke Co.* v. *Pennsylvania Railroad Company*, 230 U. S. 247. But this will not include special or particular "spotting service" such as described in *New York Central & Hudson River R. R. Co.* v. *General Electric Company*, 114 N. E. 115, over an intricate system of trackage when the railroad is not permitted to enter to extend any "spotting service" at all.

Typical of the circumstances which relieve the carrier from the duty of "spotting" cars may be noted: (a) where an industry refuses to permit the Railroad to enter upon the private industrial tracks; (b) where the physical condition and layout of the private industrial tracks will not accommodate the carriers' locomotive power without hazard or excessive delay; (c) where the industry occupies large areas with many scattered plants, connected by an intricate system of industrial tracks and used chiefly as industrial facilities.

In the instant cases, we find no circumstances which would relieve the carriers involved from the duty of "spotting" the cars as a part of the transportation imposed upon them by law. We further

find that such "spotting" service is covered by the Railroads, published tariffs, and is a part of the line-haul freight charge, and that where the plaintiffs do this "spotting service" themselves, they are entitled to the compensation provided for in the published freight tariffs.

Commissioner Mahaffie, dissenting from the majority report of the Commission, has in his report contained in the exhibits attached to the plaintiffs' petitions in the instant cases, clearly stated why the cease-and-desist orders issued by the Commission in the instant cases are not based on the jurisdictional findings necessary to support these orders and that the injunction sought should be granted in all these cases.

As we view the law, the Commission was without power to prohibit entirely allowances for doing "spotting service." It could review these allowances and determine whether they were unreasonable, unjustly preferential, unduly discriminatory or otherwise unlawful: *Section 15 (par. (1) and (13) of Interstate Commerce Act); Interstate Commerce Commission* vs. *Louisville & Nashville Railroad Company,* 227 U. S. 88, 92; *Southern Pacific Company* v. *Interstate Commerce Commission,* 219 U. S. 433; *Interstate Commerce Commission* v. *Stickney,* 215 U. S. 98, 105; *Interstate Commerce Commission* v. *Northern Pacific Railway Company,* 216 U. S. 538, 544; *United States* v. *Baltimore and Ohio Railroad Company,* 293 U. S. 454.

No such findings were made in the instant cases. The courts have uniformly held that to support a cease-and-desist order by the Commission, it must make the necessary quasi-jurisdictional findings of fact, or the order is void; *Florida* v. *United States*, 282 U. S. 191, 215; *United States* v. *Chicago, Milwaukee and St. Paul Railway Co.*, 294 U. S. 499.

Our conclusion is that the orders of the Commission complained of are beyond its statutory power, and that the injunction prayed for should issue.

Findings of fact, conclusions of law, and decree, in accordance with this opinion may be submitted.

U. S. GOVERNMENT PRINTING OFFICE: 1937